In the Supreme Court of the United States.

OCTOBER TERM, 1873.

E. B. CLINKENBEARD AND OTHERS,
Plaintiffs in Error,
vs.
THE UNITED STATES.
No. 194.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR DEFENDANTS IN ERROR.

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This is an action of debt against the principal and sureties to a distiller's bond. The breaches assigned in the declaration are, failure to pay certain taxes assessed, viz., (1) a *deficiency* tax on about 8,000 gallons of spirits, together with a special tax on about 39,000 gallons; and (2) a *capacity* tax on his distillery. (Rec. p. 7.)

The defendants pleaded jointly (1) the general issue, and (2) performance.

Upon the trial, the plaintiffs gave in evidence an assessment for a *deficiency;* and thereupon the defendants offered to show that for several days during the month for which such assessment had been made, his distil-

lery had been idle—(1) at the commencement of such month, because no storekeeper had been assigned to the distillery; (2) at another time, because at the request of the distiller, owing to an accident to the machinery, the distillery had been duly closed by the proper officer of the Government.

Upon objection by the plaintiffs, this evidence was excluded, and there was a verdict and judgment for the plaintiff.

1. The case does not show that the assessment was upon the *capacity* of the distillery. It may be that the *quantity of material returned by the distiller as actually used by him during the month* warranted the assessment made, and that there was no need to apply the rule of the statute *merely imputing* 80 per cent. production. The assessment in question may amount to more than 80 per cent. We see nothing in the case to warrant the assumption in the brief of the learned counsel, that this was a mere *capacity* tax.

If the assessment were because of material *actually used*, there is no ground for the argument submitted for the plaintiffs in error.

2. Supposing this were a mere capacity tax, the learned counsel admit that the assessment is final against the principal, because of his failing to appeal therefrom to a commissioner; but they submit that it is otherwise with the sureties.

The plea is *joint*. Unless the defence made out under it is good for *all*, it fails for *all*. The sureties should have severed from Clinkenbeard in their plea, in order to raise the point submitted here.

United States *vs.* Linn, 1 How., 104.

In reply to what is said upon pp. 18 and 19 of the brief, we submit that there is an obvious distinction between an assessment upon a person who never was a distiller, and one upon a person who, having taken upon himself the obligations of a distiller, has suspended active operations. The former is a nullity; but the latter, although erroneous, if appealed from, is final as any. He was notified before becoming a distiller that such would be the case, and in law cannot complain.

See Stevenson *vs.* Beggs, (last term,) not yet reported.

GEO. H. WILLIAMS,
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Solicitor General.